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No. 90-1846

In the Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE F. DENTON, ET AL., PETITIONERS

v.

MIKE HERNANDEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether an action is factually frivolous, and therefore subject to dismissal under 28 U.S.C. 1915(d), only if the factual allegations in the complaint are refutable by judicial notice.

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INTEREST OF THE UNITED STATES

The United States and its officers are often sued by inmates in the federal prison system who pursue their actions *in forma pauperis* as authorized by 28 U.S.C. 1915. This case presents the question of how courts are to determine whether such actions may be dismissed under 28 U.S.C. 1915(d) as factually frivolous. The Department of Justice defends *in forma pauperis* actions brought by prisoners alleging violations of their rights by federal officials, and has a strong interest in ensuring that frivolous *in forma pauperis* claims are expeditiously identified and dismissed under Section 1915(d), while nonfrivolous claims are permitted to proceed.

STATEMENT

Petitioners are officials in the California penal system. They were sued under 42 U.S.C. 1983 by respondent Mike Hernandez, a prisoner within the system. This case concerns an *in forma pauperis*[1] pro se complaint, one of several that respondent filed, alleging that he had been drugged and raped on 28 separate occasions over a two-year period by both guards and inmates at two different prisons. Respondent claimed that these incidents violated his Eighth Amendment right not to be subjected to cruel and unusual punishment, and his Fourteenth Amendment substantive due process right to protection from other prisoners. *Hernandez* v. *Denton*, 861 F.2d 1421, 1424 (9th Cir. 1988), vacated and remanded, 493 U.S. 801 (1989), on remand, 919 F.2d 573 (1990), as amended on denial of rehearing, 929 F.2d 1374 (9th Cir. 1991).

Because the alleged druggings and rapes had occurred while respondent was asleep, he had no direct recollection of any of the alleged incidents. Pet. 4. Respondent concluded that he had been drugged and raped, however, because he allegedly found needle marks on different parts of his body and fecal and semen stains on his clothes, *ibid.*, and because he inexplicably slept much more soundly and longer than

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[1] 28 U.S.C. 1915, which was originally enacted in 1892, generally authorizes parties to proceed *in forma pauperis* upon the filing of an affidavit of poverty. Subsection (d) of that statute, which is the only pertinent provision in this case, reads in full:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

usual on the nights in question. *Id.* at 6. Finally, respondent submitted affidavits from other prisoners "assert[ing] their ability to identify some of the persons who had entered [respondent's] cell." Br. in Opp. 4. Other than the assertions in the affidavits, respondent could identify no persons, including prison officials, who participated in the 28 alleged druggings and rapes. *Ibid.*

The district court referred respondent's claims to a magistrate, who concluded that respondent's complaints alleged fanciful scenarios, and were therefore frivolous. Accordingly, the magistrate recommended that the claims be dismissed under 28 U.S.C. 1915(d). Br. in Opp. 3-4. The district court agreed that the factual allegations in respondent's complaint were frivolous, and ordered the case dismissed. *Ibid.*

The Ninth Circuit reversed. 861 F.2d 1421 (1988). The court held that factual allegations in a pro se *in forma pauperis* complaint could be found "wholly fanciful" only if a court could take judicial notice that they did not occur. *Id.* at 1426. Although agreeing that it was "hard to believe" that respondent could have been raped 28 separate times without knowing it, the court could not say with certainty that respondent was *never* raped. *Id.* at 1427. The court therefore reversed the district court's finding that the complaint was factually frivolous. *Ibid.*

Judge Wallace concurred on the narrow ground that, although respondent had been given an opportunity to amend his complaint (and in fact had done so), the district court had failed to give respondent sufficient guidance regarding the deficiencies in his original complaint, as required by circuit law. 861 F.2d at 1427 (Wallace, J., concurring).

Judge Aldisert dissented. In his view, respondent's allegations were clearly "the hallucinations of a trou-

bled man," 861 F.2d at 1440 (Aldisert, J., dissenting); moreover, in view of respondent's inability to connect any individuals to his allegations, Judge Aldisert concluded that no further amendment could save the complaint. *Id.* at 1439-1440. Judge Aldisert discounted the usefulness of one affidavit purporting to identify two prisoners who had allegedly raped respondent, noting that at most the affidavit might have supported a state-law tort claim; the affidavit in question (which was the only one mentioned at any point in the three opinions issued by the court of appeals) did not, in Judge Aldisert's view, support or make plausible respondent's claim of 28 separate rapes over two years. *Id.* at 1436-1437.

This Court vacated the Ninth Circuit's judgment and remanded for further consideration in light of the intervening decision in *Nietzke* v. *Williams*, 490 U.S. 319 (1989). *Denton* v. *Hernandez*, 493 U.S. 801 (1989). On remand, the Ninth Circuit reaffirmed its earlier decision. Pet. App. A1-A16. The court purported to soften its earlier holding that *only* factual allegations subject to refutation by judicial notice are frivolous under Section 1915(d). The court stated that judicial notice was "one useful standard in determining whether a claim is patently frivolous as 'founded on wholly fanciful factual allegations.'" Pet. App. A8-A9. Relying on its earlier analysis, the Ninth Circuit stated that because it could not take judicial notice that none of the rapes occurred, the district court erred in dismissing the complaint as factually frivolous under Section 1915(d). Pet. App. A8-A9. Notwithstanding its statement that judicial notice was merely one method for determining factual frivolity, the court did not analyze the case under any other method that it thought might be appropriate.

SUMMARY OF ARGUMENT

In *Nietzke* v. *Williams*, 490 U.S. 319, 325 (1989), this Court established that complaints lacking an "arguable basis either in law or in fact" are frivolous and therefore subject to dismissal under 28 U.S.C. 1915(d). Since *Nietzke*, however, the Court has not had occasion to elaborate on the standard enunciated in that case; as a result, the lower courts have been left without guidance in analyzing whether allegations in an *in forma pauperis* complaint lack an "arguable basis" in fact.

The "judicial notice" standard followed by the Ninth Circuit in this case is inconsistent with both the language of Section 1915(d), which states that a court may dismiss if "satisfied" that the action is frivolous, and this Court's statement in *Nietzke* that Section 1915(d) gives district courts the "unusual power to pierce the veil of [a] complaint's factual allegations." 490 U.S. at 327. In addition, other courts of appeals, while generally eschewing a standard as restrictive as the Ninth Circuit's, have not developed a consistent approach that allows arguably meritorious claims to go forward while pretermitting factually baseless litigation. As a general matter, the lower courts have stated that inarguable factual claims are frivolous, but they have not settled upon a concrete, objective approach to determining whether particular allegations are inarguable.

A more predictable and objective standard—and one that gives due effect to the purposes underlying Section 1915—is readily at hand. That standard was intimated in *Nietzke* itself, where the Court indicated that Section 1915(d) serves the same purpose in the context of *in forma pauperis* suits that Federal Rule of Civil Procedure 11 serves with respect to pay-

ing litigants. See 490 U.S. at 327. As the Court explained in *Nietzke*, because *in forma pauperis* litigants are not deterred from advancing factually frivolous claims by the threat of financial sanctions under Rule 11, Section 1915(d) is properly interpreted to serve the same deterrent purpose. Courts should therefore look to Rule 11 and precedent under that Rule in construing Section 1915(d), and district courts should be free to dismiss a complaint under Section 1915(d) if an attorney or party who signed the same complaint would have been subject to sanctions under Rule 11.

This Rule 11-based standard would effectuate the purposes of Section 1915(d) and recognize that *in forma pauperis* litigants are no more free to mount factually frivolous claims than are paying litigants or their lawyers, who face the threat of financial sanctions if they succumb to the temptation of doing so. Applying that standard to this case, the district court acted properly in dismissing respondent's complaint because no reasonable attorney or paying litigant could have concluded that the allegations in the complaint were well grounded in fact.

Finally, regardless of the substantive standard that guides the exercise of discretion in this area, the language and purposes of the statute—as well as this Court's prior decisions—make clear that district courts enjoy broad discretion to determine when dismissal under Section 1915(d) is appropriate. Accordingly, trial court decisions to dismiss under Section 1915(d) should be reviewable on appeal only for abuse of discretion. In this case, the district court acted within its sound discretion in dismissing respondent's bizarre claim that he was drugged and raped 28 times by unknown assailants; the Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT ON THE GROUND THAT THE FACTUAL ALLEGATIONS IN THE COMPLAINT WERE NOT SUBJECT TO REFUTATION BY JUDICIAL NOTICE

The federal *in forma pauperis* statute, 28 U.S.C. 1915, ensures that impecunious citizens enjoy the same access to the federal courts as litigants who are able to pay. *Nietzke* v. *Williams*, 490 U.S. at 324. As this Court has noted, however, the right to proceed *in forma pauperis* is vulnerable to abuse because *in forma pauperis* litigants are not deterred by financial incentives "from filing frivolous, malicious, or repetitive lawsuits." *Ibid.* The potential for abuse of Section 1915 is especially acute in the context of suits by prison inmates. Such individuals not only have no financial disincentive to mount such claims, but may look upon bringing suit as a means to "obtain[] a short sabbatical in the nearest federal courthouse." *Cruz* v. *Beto*, 405 U.S. 319, 327 (1972) (Rehnquist, J., dissenting). Section 1915(d), which permits a court to dismiss a case if "satisfied" that the action is frivolous or malicious, is intended to prevent such abuses. To that end, dismissals under Section 1915(d) often occur *sua sponte* before process is issued—an important and salutary procedure which "spare[s] prospective defendants the inconvenience and expense of answering such complaints." *Nietzke*, 490 U.S. at 324.

In enacting Section 1915(d), Congress afforded little concrete guidance in interpreting the statute. As this Court stated in *Nietzke*, "[t]he brevity of Section 1915(d) and the generality of its terms have left the judiciary with the not inconsiderable tasks of

fashioning the procedures by which the statute operates and of giving content to Section 1915(d)'s indefinite adjectives." 490 U.S. at 324-325 (footnote omitted). In its first statement giving content to Section 1915(d), the Court in *Nietzke* stated that a complaint is frivolous within the meaning of that statute if it has no "arguable basis either in law or in fact." 490 U.S. at 325.[2] The Court has not, however, had occasion to elaborate on the *Nietzke* standard, and, in particular, has not provided the lower courts with guidance in determining whether allegations of fact have an "arguable basis" within the meaning of Section 1915(d).

After this Court's remand of the case for further consideration in light of *Nietzke*, the Ninth Circuit adhered to its prior method of determining whether factual allegations are frivolous. That standard is this: District courts cannot dismiss complaints as factually frivolous unless the allegations set forth in the complaint are refutable by judicial notice.[3] Under this test, a complaint must be literally delusional or demonstrably inconsistent with publicly known facts to fall within Section 1915(d)'s reach. Thus, as long

[2] The holding in *Nietzke* was that an *in forma pauperis* complaint that fails to state a claim under Fed. R. Civ. P. 12(b)(6) is not as a result automatically frivolous within the meaning of Section 1915(d). After *Nietzke*, a complaint is *legally* frivolous under Section 1915(d) if " '[none] of the legal points [is] arguable on [its] merits.' " *Nietzke*, 490 U.S. at 325, quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967). The issue of how to determine whether factual allegations are frivolous was not directly presented in *Nietzke*.

[3] The court of appeals purported to hold that judicial notice is just "one useful standard" for determining factual frivolity, Pet. App. A8-A9, but failed even to mention any other standard, much less apply one to the facts of this case.

as the allegations could possibly have occurred as a metaphysical matter, district courts are bound to let the case go forward.

This sweeping standard is inconsistent with this Court's statement in *Nietzke* that Section 1915(d) "accords judges * * * the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." 490 U.S. at 327. There is nothing "unusual" about rejecting claims refutable by judicial notice; this Court plainly had something more in mind given its statement in *Nietzke*. More fundamentally, the court of appeals' judicial notice standard is at odds with the goals underlying Section 1915(d), namely to

> enable a district court to determine at the earliest possible stages in pro se litigation whether there is any merit to an [*in forma pauperis*] proceeding. * * * An early determination of the merits of an [*in forma pauperis*] proceeding provides a significant benefit to courts (because it will allow them to use their scarce resources effectively and efficiently), to state officials (because it will free them from the burdens of frivolous and harassing litigation), and to prisoners (because courts will have the time, energy and inclination to give meritorious claims the attention they need and deserve).

Green v. *McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986). The court of appeals' decision will unjustifiably hamper the ability of district courts expeditiously to dispose of factually frivolous claims—"claims with which federal district judges are all too familiar." *Nietzke*, 490 U.S. at 328. The "judicial notice" standard should accordingly be rejected.

In general, the courts of appeals have not settled upon a consistent approach for determining whether factual allegations are frivolous. By and large, the standards those courts have adopted track this Court's statement in *Nietzke* that allegations without an arguable basis in fact are frivolous. 490 U.S. at 325. As a result of the generality of the *Nietzke* standard, however, this facial harmony gives way to varying applications in the cases, sometimes even within the same circuit.[4]

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[4] See, *e.g.*, *Luciano* v. *Galindo*, 944 F.2d 261, 265 (5th Cir. 1991) (two-part inquiry into whether the complaint has a realistic chance of ultimate success on the merits or whether it lacks an arguable factual basis); *Mayfield* v. *Collins*, 918 F.2d 560 (5th Cir. 1990) (same); *Clark* v. *Georgia Pardons & Paroles Bd.*, 915 F.2d 636 (11th Cir. 1990) (whether complaint has realistic chance of success, which is measured by whether the allegations are arguable); *Battle* v. *Central State Hosp.*, 898 F.2d 126, 129-130 (11th Cir. 1990) (whether allegations are "clearly baseless" or have "some rational basis"); *Williams* v. *Faulkner*, 837 F.2d 304, 308 (7th Cir. 1988) (whether plaintiff can make a "rational argument in law or fact"), aff'd on other grounds, 490 U.S. 319 (1989); *Brandon* v. *District of Columbia Bd. of Parole*, 734 F.2d 56 (D.C. Cir. 1984) (whether the allegations are supportable by an arguable basis in fact), cert. denied, 469 U.S. 1127 (1985); *Crisafi* v. *Holland*, 655 F.2d 1305 (D.C. Cir. 1981) (whether the allegations are wholly fanciful or conflict with facts that are subject to judicial notice) (per curiam); *Lawler* v. *Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990) (whether factual allegations are rational and not the product of true delusion); *Malone* v. *Colyer*, 710 F.2d 258, 261 (6th Cir. 1983) (rejecting the "no realistic chance of success" formulation); *White* v. *White*, 886 F.2d 721 (4th Cir. 1989) (rejecting Sixth Circuit's approach in favor of an "arguable basis" standard requiring specificity in factual allegations); *Boyce* v. *Alizaduh*, 595 F.2d 948, 952 (4th Cir. 1979) (rejecting "no realistic chance of success" approach); *Nance* v. *Kelly*, 912 F.2d 605, 606 (2d Cir. 1990) (whether factual allegations are "clearly baseless"); *Anderson* v. *Coughlin*, 700 F.2d 37 (2d Cir. 1983) (whether there is little chance for ultimate success on the merits); *Dace* v. *Solem*, 858 F.2d 385, 387-388 (8th Cir. 1988) (whether plaintiff can make a "factually rational" argument in support of his claim, which is seemingly equivalent to whether it is "conceivable" that evidence to support the claim could be developed); *Roman* v. *Jeffes*, 904 F.2d 192, 195 (3d Cir. 1990) (whether the allegations in the complaint are clearly baseless); *Wilson* v. *Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989) (whether allegations are fanciful or delusional).

In short, the lower courts have failed to develop a satisfactory method for determining what constitutes a "clearly baseless" allegation, or an "irrational" one, or one with no "arguable" basis. To the extent that the standards followed by the lower courts do provide predictability, moreover, it is at the expense of requiring district courts to permit baseless cases to go forward. See, *e.g.*, *Lawler* v. *Marshall*, 898 F.2d at 1199 (defining delusional allegation as one "asserting that Robin Hood and his Merry Men * * * or that a genie" wronged plaintiff). A more objective formulation—and one which serves the dual purposes of Section 1915 as described by the Court in *Nietzke*—is readily available in a closely related body of federal law.

II. FACTUAL ALLEGATIONS IN A COMPLAINT ARE "INARGUABLE," AND THEREFORE FRIVOLOUS UNDER SECTION 1915(d), IF NO REASONABLE ATTORNEY OR PAYING LITIGANT WOULD CERTIFY THAT THEY ARE "WELL GROUNDED IN FACT" WITHIN THE MEANING OF FED. R. CIV. P. 11

A. Section 1915(d) Should Have The Same Deterrent Effect In *In Forma Pauperis* Litigation That Rule 11 Has In Paid Litigation

This Court made clear in *Nietzke* that the function of Section 1915(d) is to provide both courts and defendants with protection from frivolous or malicious claims filed by *in forma pauperis* litigants. Without Section 1915(d) there would be no check on frivolous *in forma pauperis* litigation because such litigants lack any financial incentive not to advance such claims. This Court in *Nietzke* stated

> Section 1915(d) is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11.

490 U.S. at 327. The Court went on to explain that Section 1915(d) "replicat[es] the function of screening out inarguable claims which is played in the realm of paid cases by financial considerations," and that the "cost of bringing suit and the fear of financial sanctions doubtless deter most inarguable paid claims." 490 U.S. at 328.

As the Court noted, the Federal Rules of Civil Procedure explicitly deter paying litigants—on whom financial considerations have an obvious impact—

from filing factually frivolous pleadings. Rule 11 requires that a party or his lawyer sign each pleading or motion in a case. That signature certifies, among other things, that after reasonable inquiry the signer has concluded that "the pleading is well grounded in fact." Fed. R. Civ. P. 11. Upon determining that a violation of Rule 11 has occurred, courts must impose a sanction, which may include payment of the other side's attorney fees. In the realm of paid litigation, most factually inarguable (*i.e.*, frivolous) claims are undoubtedly never filed because no counsel would agree to certify that such factual allegations are reasonably well grounded.

In *in forma pauperis* litigation, by contrast, the threat of sanctions under Rule 11 has no practical effect because such litigants by definition have nothing to lose. See *Nietzke*, 490 U.S. at 327-328. It is beyond question, however, that *in forma pauperis* litigants (even those proceeding pro se) are no more at liberty to bring frivolous claims or make baseless factual allegations than are paying litigants or their counsel. *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991). Section 1915(d) should threaten *in forma pauperis* plaintiffs with dismissal of factually frivolous actions in the same way that Rule 11 threatens financial sanctions against those who make similar allegations in paid litigation.

If the factual allegations in an *in forma pauperis* complaint would expose a party or his attorney to sanctions under Rule 11 for filing a pleading that is not well grounded in fact, those factual allegations are frivolous within the meaning of Section 1915(d). As a practical matter, this means that a complaint is frivolous within the meaning of Section 1915(d) if

its factual allegations are so implausible or unlikely to have occurred that a reasonable attorney, knowing all the circumstances, would have refused to sign the pleading to certify that it was well grounded in fact.[5]

The standard for determining whether a pleading is well grounded in fact under Rule 11 is well established. This Court, embracing the rule previously adopted by every circuit, has agreed that the Rule requires an objective standard. *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. at 931-933. That standard asks whether it was reasonable under the circumstances for the attorney or party to certify that the pleading, motion or paper was well grounded in fact. *Ibid.* See also 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1335, at 61-62 & n.12 (1990) (gathering cases).

In determining whether a pleading is well grounded in fact, it is clear that the signer has "an affirmative duty to conduct a reasonable inquiry into the facts * * * before filing" the complaint. *Business Guides, Inc.*, 111 S. Ct. at 933. That inquiry must result in a

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[5] In *Business Guides*, the Court held that Rule 11 applies to whoever signs a pleading and thereby certifies that it is well grounded in fact—whether the signer is a party (represented by counsel or not) or a lawyer. 111 S. Ct. at 928-931. The Court also held that the standard for determining whether a Rule 11 violation had occurred—whether the signer's action was reasonable under the circumstances—is the same regardless whether it was a party or lawyer who signed the potentially sanctionable pleading. *Id.* at 931-933. Indeed, the Court suggested that because parties are generally in a better position than their lawyers to know the underlying factual basis for their complaints, what is "reasonable under the circumstances" for them may sometimes be more stringent than what is reasonable for their lawyers. *Ibid.*

"substantiated belief" that the pleading is well grounded in fact. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2454 (1990). Whether the attorney or party has taken adequate steps in arriving at such a belief is measured by the objective standard of "reasonableness under the circumstances." *Business Guides, Inc.*, 111 S. Ct. at 933.

In discharging his duty to conduct a reasonable investigation, a lawyer cannot take "safe harbor" in relying on the truth of his "client's careless misrepresentations." 111 S. Ct. at 933. Rather, there is an independent duty to verify the client's story, which is discharged by pursuing avenues of investigation that are reasonably available. See, *e.g.*, *Brown* v. *Federation of State Medical Bds.*, 830 F.2d 1429 (7th Cir. 1987). For example, it is sanctionable not to review documents that might refute or verify a client's claim. *Id.* at 1436-1437. Moreover, an attorney must attempt to corroborate his client's second-hand account of an occurrence, *Hilton Hotels Corp.* v. *Banov*, 899 F.2d 40, 43 (D.C. Cir. 1990), and cannot take his client's word for what happened. *Muraoka* v. *American Osteopathic Assoc.*, 117 F.R.D. 616 (N.D. Ill. 1987).

In addition to considering the reasonableness of the signer's conduct, however, the *substance* of the allegations in question is part of the Rule 11 inquiry. Some allegations are so unreasonable and implausible that no investigation could result in a reasonable, substantiated belief that they are true. As one court noted, the question of whether an attorney's investigation is reasonable depends in part on the inherent plausibility of the facts alleged. *Calloway* v. *Marvel Entertainment Group*, 854 F.2d 1452, 1470 (2d Cir. 1988), rev'd in part on other grounds, 493 U.S. 120

(1989). Thus, a lawyer may not urge a factual claim that any reasonable lawyer would have disbelieved—no matter how broad an investigation he has pursued. *Lemaster* v. *United States*, 891 F.2d 115, 119-120 (6th Cir. 1989). And if it is apparent from the substance of a witness' proposed testimony that it is unbelievable and incredible, a lawyer could not reasonably believe that a fact-finder might conclude otherwise. *Id.* at 121; see also *California Architectural Bldg. Prods., Inc.* v. *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1472 (9th Cir. 1987) (pleading is sanctionable if it is factually baseless and "lacking in plausibility"), cert. denied, 484 U.S. 1006 (1988); *Rachel* v. *Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir. 1987) (same).

The Rule 11 inquiry translates well to the Section 1915(d) context. Considering all the circumstances—including the factual allegations on the face of the complaint, any corroborative evidence that is offered, and any other information available regarding the case or the plaintiff—would a reasonable inquiry by an attorney or paying litigant (for whom the prospect of financial sanctions is a deterrent) have led him to conclude that the complaint was well grounded in fact? In this context, it is important to note that *in forma pauperis* civil rights plaintiffs are properly required specifically to plead all facts that corroborate their claims, which is the "rule adopted in some form by every circuit." *White* v. *White*, 886 F.2d 721, 724 (4th Cir. 1989). Some factual scenarios are so implausible that no reasonable attorney or paying litigant could conclude, after any amount of investigation, that they in fact occurred. Under Section 1915(d), district courts should be permitted to dismiss complaints that are based on such scenarios.

This standard gives effect to Section 1915's dual purposes. It preserves claims that are plausible enough for a reasonable lawyer or paying litigant to bring. At the same time, it permits courts to disbelieve outlandish claims in the same way that a competent lawyer would.[6]

Neither the language of Section 1915(d) nor its underlying purposes requires more. Nor is our suggested approach inconsistent with the well-established proposition that pro se complaints are to be liberally construed. See *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972).[7] As this Court explicitly stated in *Nietzke*, the purpose of Section 1915 is to put *in forma pauperis* litigants—who proceed most often on a pro se basis—on "similar footing" with those who can pay. 490 U.S. at 330. The principle favoring liberal construction of pro se pleadings comes from a recognition that pro se litigants are often "less capable [than

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[6] The standard we propose allows district courts to disbelieve factual allegations that are inherently implausible, even if they are not literally delusional. Some circuits, however, require as part of the Section 1915(d) analysis that the truth of a complaint's factual allegations be assumed. See *Money* v. *Moore*, 877 F.2d 9 (8th Cir. 1989); *Hernandez* v. *Denton*, 861 F.2d at 1424 (citing *Franklin* v. *Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)); *Malone* v. *Colyer*, 710 F.2d 258, 260 (6th Cir. 1983). The rule adopted by these courts is contrary both to the language of the statute, which allows courts to dismiss if they are "satisfied" that a case is frivolous, and to this Court's clear statement in *Nietzke* that Section 1915(d) gives courts the "unusual power to pierce the veil of the complaint's factual allegations." 490 U.S. at 327.

[7] The canon mandating liberal construction of pro se complaints does not necessarily apply in interpreting Section 1915(d), because *in forma pauperis* actions may be brought by litigants who are represented by counsel. See *Nietzke*, 490 U.S. at 330 n.9.

attorneys] of formulating legally competent initial pleadings," *ibid.* (citing *Haines* v. *Kerner*, 404 U.S. at 520). Liberal construction of a complaint does not mean, however, that pro se *in forma pauperis* plaintiffs are somehow freer to raise inarguable factual claims.

Thus, we believe that a complaint "lacks an arguable basis * * * in fact," *Nietzke*, 490 U.S. at 325, where no reasonable attorney or paying litigant would expose himself to sanctions by certifying that its allegations are well founded.[8] The objective standard used by the courts of appeals in evaluating whether factual allegations are sanctionable under Rule 11 is not only easier to apply than the Section 1915(d) standards heretofore followed by the courts of appeals, but it is also more faithful to the underlying purposes of Section 1915(d).

B. Rule 11 Would Have Deterred A Paying Litigant Or His Attorney From Signing Respondent's Complaint Because Its Factual Allegations Are Inherently Implausible And Illogical

Respondent's complaint in this case alleged that he had been drugged and raped on 28 separate occasions over a two-year period at two different penal institutions—all without his knowledge. Respondent did not plead any facts to make this facially implausible scenario appear at all likely to have occurred. Indeed, the only "evidence" respondent claimed to have was that he (1) found inexplicable needle marks on his body; (2) found inexplicable fecal and semen stains on his clothing; (3) slept longer and more soundly than usual on the nights in question; and (4) had been taunted by prison guards and inmates, which led him to conclude that he had been drugged and raped.[9]

A reasonable lawyer confronted with this story would not dream of filing a complaint based upon it. Even if one assumes that respondent in fact found needle marks on his body and stains on his clothes, it does not follow that he was ever drugged and raped. It is even more illogical to think that any particular prison officials (who respondent admits he cannot identify) had any hand in the alleged wrongdoing.

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[8] The standard we advocate is also consistent with *Anders* v. *California*, 386 U.S. 738, 744 (1967), in which the Court determined that an appeal is legally frivolous if none of the legal points is "arguable on [its] merits." In *Nietzke*, the Court noted that, "[b]y logical extension [from *Anders*], a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact." 490 U.S. at 325. If a complaint's factual allegations are so implausible that no reasonable attorney would make them, those allegations are inarguable—which is of course the formulation used in both *Anders* and *Nietzke*.

[9] Respondent did offer the affidavit of another prisoner, which stated that the prisoner had on one occasion witnessed respondent being raped in his sleep by two other inmates. Although this evidence might have supported a plausible claim of some sort, it cannot support, and does not make any more plausible, a claim that respondent was raped without his knowledge by a variety of persons on 28 separate occasions at different places over a two year period. See *Hernandez* v. *Denton*, 861 F.2d at 1437 (Aldisert, J., dissenting). To the contrary, the claim of 28 separate rapes makes the allegedly witnessed rape *less* plausible, rather than the allegedly witnessed rape making the other alleged rapes more plausible. Moreover, the district court gave respondent an opportunity to amend his complaint, presumably to plead a *more* realistic cause of action which was tied to the evidence provided by the affidavit in question, but respondent did not do so.

In truth, respondent's claim is entirely implausible. No competent lawyer or paying litigant, after conducting a reasonable investigation, would have filed this claim. To do so would have assured that Rule 11 sanctions would fall like rain. Thus, the district court acted entirely properly in dismissing respondent's claims as factually frivolous under Section 1915(d).

III. SECTION 1915(d) AFFORDS DISTRICT COURTS BROAD DISCRETION TO DISMISS A CASE WHEN THEY ARE "SATISFIED THAT [IT] IS FRIVOLOUS OR MALICIOUS"

Regardless of the substantive standard applied in evaluating Section 1915(d) dismissals, it is plain that Section 1915(d) accords district courts discretion to determine when a case is frivolous or malicious. First, the statute by its clear terms provides that courts "may" dismiss upon becoming "satisfied that the action is frivolous or malicious." 28 U.S.C. 1915(d). Second, this Court has "recognize[d] that [Section 1915(d)] vests the federal courts with broad discretion to * * * identify and dismiss frivolous complaints." *Boag* v. *MacDougall*, 454 U.S. 364, 365 n.* (1982); see also 454 U.S. at 368-369 (Rehnquist, J., dissenting).[10] Thus, the statute provides any federal court with discretion to dismiss an *in forma*

[10] Section 1915(d) applies generally to all federal courts. Thus, by the statute's terms any federal court has discretion to dismiss a case before it when it deems such action appropriate. This Court, for example, has itself exercised the discretion vested in it by Section 1915(d) to bar prospectively certain litigants from proceeding on an *in forma pauperis* basis. See, *e.g.*, *In re Sindram*, 111 S. Ct. 596 (1991); *In re McDonald*, 489 U.S. 180 (1989).

pauperis case before it upon becoming satisfied that the action is frivolous.

Despite this seemingly clear principle, the Ninth Circuit reviews decisions to dismiss under Section 1915(d) on a de novo basis. See *Jackson* v. *Arizona*, 885 F.2d 639, 640 (1989). This is inconsistent not only with the language of the statute and this Court's construction of it in *Boag*, but it also flies in the face of the decisions of other courts of appeals. See, *e.g.*, *Ross* v. *Social Security Admin.*, No. 90-2697 (8th Cir. Nov. 26, 1991); *Clark* v. *Georgia Pardons & Paroles Bd.*, 915 F.2d 636 (11th Cir. 1990); *Wesson* v. *Oglesby*, 910 F.2d 278 (5th Cir. 1990); *Williams* v. *Faulkner*, 837 F.2d 304 (7th Cir. 1988), aff'd, 490 U.S. 319 (1989); *Yellen* v. *Cooper*, 828 F.2d 1471 (10th Cir. 1987); *Brandon* v. *District of Columbia Bd. of Parole*, 734 F.2d 56 (D.C. Cir. 1984), cert. denied, 469 U.S. 1127 (1985); *Anderson* v. *Coughlin*, 700 F.2d 37 (2d Cir. 1983); *Boyce* v. *Alizaduh*, 595 F.2d 948 (4th Cir. 1979); but cf. *Young* v. *Kann*, 926 F.2d 1396 (3d Cir. 1991) (reviewing de novo district court decision to dismiss action as legally frivolous under Section 1915(d)). Indeed, the Ninth Circuit itself sometimes reviews district court decisions to dismiss under Section 1915(d) on an abuse of discretion basis, and is therefore inconsistent in its own approach. See *Fay* v. *Quinlan*, No. 89-35404 (9th Cir. 1991), slip op. n.2 (noting that the Ninth Circuit has been inconsistent in the standard of review that is applied) (unpublished).

The need for discretion in the district courts is especially acute in the Section 1915(d) context. District courts are regrettably familiar with the flood of *in forma pauperis* litigation that has overtaken the federal courts in recent years. *Nietzke*, 490 U.S.

at 328. See also *Hernandez* v. *Denton*, 861 F.2d at 1430-1433 (Aldisert, J., dissenting) (gathering statistics). Experience has proven that a great deal of this litigation is entirely baseless. This genre of litigation demeans our system of justice and deflects scarce judicial resources from claims of potential merit. It is therefore important not to deprive federal judges of a basic tool that protects the integrity of ever-growing dockets. As the Court has explained in the Rule 11 context, district courts are "[f]amiliar with the issues and litigants" and hence are "better situated than the court[s] of appeals" to evaluate the facts and apply the relevant fact-dependent legal standard. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. at 2459. See also *id.* at 2457-2461 (holding that imposition of Rule 11 sanctions is reviewable on appeal only for abuse of discretion). These factors are equally, if not more, prevalent in the Section 1915(d) context.

Accordingly, district courts should enjoy broad discretion to dismiss actions under Section 1915(d), and such decisions should be reviewable on appeal only for abuse of that discretion. Here, the district court properly exercised its discretion in dismissing respondent's far-fetched claim that he was drugged and raped 28 times by unknown assailants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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